No. 87-645

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

F. CLARK HUFFMAN, *et al.*,
Petitioners,

v.

WESTERN NUCLEAR, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Section 161(v) of the Atomic Energy Act of 1954, 42 U.S.C. § 2201(v), provides that the Department of Energy ("DOE"), "to the extent necessary to assure the maintenance of a viable domestic uranium industry, shall not offer [enrichment] services" for foreign-source uranium destined for domestic use.

The question presented is whether Section 161(v) requires DOE to restrict enrichment of foreign-source uranium when the domestic uranium industry is not viable.

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO SUP. CT. RULE 28.1

The petitioners are the United States Department of Energy ("DOE") and the following officers or employees of DOE who were sued in their official capacities: John S. Herrington, Secretary of Energy, F. Clark Huffman, Sherry E. Peske, Philip G. Sewell, James W. Vaughn, and Joseph F. Salgado.

Respondents are Western Nuclear, Inc., Energy Fuels Nuclear, Inc., and Uranium Resources, Inc. Western Nuclear, Inc. is a wholly-owned subsidiary of Phelps Dodge Corporation. Energy Fuels Nuclear, Inc. is wholly owned by JRA Enterprises, Ltd., a Colorado limited partnership. The sole general partner of JRA Enterprises, Ltd. is John R. Adams.

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BRIEF FOR THE RESPONDENTS

STATEMENT

A. Introduction

Section 161(v) of the Atomic Energy Act of 1954, 42 U.S.C. § 2201(v), authorizes the Department of Energy ("DOE")[1] to provide uranium enrichment services for operators of nuclear reactors.[2] That authorization

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[1] Initially, the Atomic Energy Commission ("AEC") was responsible for administering all provisions of the Atomic Energy Act, including Section 161(v). DOE has succeeded to the AEC's responsibilities under Section 161(v), while primary authority over licensing and related matters now rests with the Nuclear Regulatory Commission ("NRC"). *See* p. 28, *infra*.

[2] As the court of appeals explained (Pet. App. 4a), natural uranium cannot be used directly as fuel in nuclear reactors:

> Natural uranium consists of less than one percent U-235, and nuclear fuel must contain approximately three percent U-235. Thus, to be used as nuclear fuel, uranium must have a higher concentration of U-235 than is found in nature. The process that produces this high concentration is called "enrichment."

is subject to a number of limitations, including the following proviso:

> That the [Department], to the extent necessary to assure the maintenance of a viable domestic uranium industry, shall not offer such [enrichment] services for source or special nuclear materials of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States.

This case involves the proper interpretation of the Section 161(v) proviso. It is undisputed that Congress' goal was to ensure the continued viability of the domestic uranium industry. Both courts below concluded that Section 161(v) embodies a congressional determination that restrictions on enrichment of low-cost foreign uranium would accomplish the statutory goal, and that the statute directs the agency to impose such enrichment restrictions unless and until the domestic industry's viability is assured.

Petitioners concede (Pet. Br. 39) that the statute rests on Congress' assumption that enrichment restrictions would cause the price of uranium to increase and thus would ensure the maintenance of a viable domestic uranium industry. Petitioners also concede that the domestic uranium industry is not now viable and has not been viable for several years. They contend, however, that certain changes have occurred since the enactment of Section 161(v) that make it unlikely that imposition of restrictions on enrichment of foreign uranium would, standing alone, return the domestic industry to a condition of viability. This contention is based on a "determination" by DOE that is not part of the record in this case and that, as Congress has explicitly directed, may not be used in resolving the statutory construction question presented here.

In any event, as shown below, DOE may not ignore the statutory mandate because, in its view, as a result

of changed circumstances, compliance with the statute would not achieve the statutory goal. Instead, the agency's only recourse is to request Congress to amend the statute. Congress has considered such requests in recent years, but thus far it has refused to rewrite the statute to alter DOE's statutory duty.

B. Statutory and Regulatory Background

1. *Enactment of Section 161(v)*

Congress enacted Section 161(v) in 1964, as part of the Private Ownership of Special Nuclear Materials Act, Pub. L. No. 88-489, 78 Stat. 602 (hereinafter Private Ownership Act), which permitted ownership of uranium by private entities and authorized the AEC to enter into contracts for the enrichment of privately-owned uranium at non-discriminatory prices. Passage of Section 161(v) followed extensive hearings at which representatives of the AEC, the electric utility industry and uranium producers generally agreed upon the need to provide protection to assure the continued existence of the emerging domestic uranium mining and milling industry.[3]

In a report recommending the enactment of the Private Ownership Act, the Joint Committee on Atomic Energy noted that ten years earlier, the United States had been "a have-not Nation in terms of discovered and developed uranium reserves." S. Rep. No. 1325, 88th Cong., 2d Sess. 10 (1964). That condition had been overcome by the AEC's program of "extending substantial incentives to American industry," which then "embarked upon an ambitious program of exploration for

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[3] *See Private Ownership of Special Nuclear Materials: Hearings Before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy*, 88th Cong., 1st Sess. (1963) (hereinafter 1963 Hearings); *Private Ownership of Special Nuclear Materials: Hearings Before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy*, 88th Cong., 2d Sess. (1964) (hereinafter 1964 Hearings).

uranium." *Id.* The Joint Committee reported that as a result of this effort, the United States "has today [] among the largest uranium reserves in the world, and, also, we have created a substantial uranium mining and milling industry." *Id.*

Despite this growth, the Joint Committee noted that the new mining and milling industry was "completely dependent upon the Government" because at the time the Government was the only provider of enrichment services and was the only large-scale purchaser of uranium, principally for weapons. *Id.* Contemporaneous projections indicated, however, that the Government's future purchases of uranium would not be large enough "to support a viable domestic uranium industry beyond 1970," when the Government's existing uranium supply contracts were due to expire. *Id.*

By authorizing both private ownership of uranium and "toll enrichment" by the AEC of privately-owned uranium, the Private Ownership Act was intended to promote a "more normal commercial market" for natural uranium. *Id.* Under the Act, enrichment of privately-owned uranium was authorized to begin in 1969. While Congress was considering the legislation, some AEC officials proposed that the agency begin the enrichment of foreign uranium intended for domestic use in mid-1975, because by that time, "the civilian requirements are expected to be sufficiently high that the viability of the domestic industry would no longer be at stake." *Id.* at 30.

The Joint Committee recognized, however, that it was impossible to predict the condition of the domestic uranium industry a decade hence. *Id.* at 31. It noted that considerable concern had been expressed at the hearings regarding the "serious impact" that "substantial imports of foreign uranium for enrichment and sale on the domestic market" could have on the domestic uranium

industry, particularly during periods of "limited demand." *Id.* at 16. It further found the health of the domestic uranium industry to be "closely related to our vital defense and security interests." *Id.* at 17. The Joint Committee therefore "directed" the AEC, in Section 161(v), "not to offer uranium enrichment services" for foreign uranium "to the extent necessary to assure the maintenance of a viable domestic uranium industry." *Id.* at 16.[4]

2. *The Agency's Initial Interpretation and Implementation of the Statute*

The AEC originally took decisive action to carry out its obligations under Section 161(v). In 1966 the agency adopted "criteria" for the enrichment program that barred *any* enrichment of foreign-source uranium for domestic end use. 31 Fed. Reg. 16,479 (1966). For more than ten years, the enrichment of foreign-source uranium was prohibited entirely.

In 1968, the AEC advised Congress that any future relaxation of the enrichment restriction would be "consistent with reasonable assurance of the viability of the domestic uranium industry."[5] In 1972, the AEC Chair-

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[4] Section 161(v) was not the only provision in the Private Ownership Act designed to safeguard national defense and security interests. Other provisions of the Private Ownership Act amended the Atomic Energy Act to authorize the AEC to restrict the importation of foreign-source uranium. Under Section 53(a) of the Atomic Energy Act, 42 U.S.C. § 2073(a), the AEC is authorized to issue licenses to import special nuclear material. Section 57(c) of the Act, 42 U.S.C. § 2077(c), provides, however, that the AEC "shall not . . . issue a license pursuant to Section 2073 to any person within the United States if the Commission finds that . . . the issuance of such license would be inimical to the common defense and security . . . ."

[5] Atomic Energy Commission, 1968 Statement on Uranium Supply Policies and Related Activities, *reprinted in Status of the Domestic Uranium Mining and Milling Industry, The Effects of Imports: Hearings Before the Subcomm. on Energy Research and Development of the Senate Comm. on Energy and Natural Resources*, 97th Cong., 1st Sess. 415 (1981).

man testified that modification of the existing ban on enrichment of foreign-source uranium would be undertaken only if it was consistent with the maintenance of a viable domestic uranium industry. The Chairman explained that the restriction might be

> adjusted so as to take an unbearable load off American suppliers, but would still permit the growth of American industry . . . . If there are American uranium reserves to be exploited, the intention would be that those reserves would be exploited.[6]

In 1974, the AEC concluded that the demand for uranium was likely to expand dramatically, and that restrictions on enrichment of foreign-source uranium could be phased out over a ten-year period without adversely affecting the viability of the domestic uranium industry. The agency proposed to begin removing the restrictions in 1977 and to lift all restrictions by the end of 1983. 39 Fed. Reg. 38,016 (1974).

AEC Chairman Anders assured Congress, however, that the restrictions would be reimposed if the viability of the domestic uranium industry were threatened:

> Should there be any indication that the proposed schedule [of eliminating restrictions] is endangering domestic industry viability, U.S. self-sufficiency, or our national security, the Commission will reimpose restrictions or take such other steps as might be appropriate.[7]

Among the "other steps" referred to by AEC officials was the exercise of the agency's licensing authority

[6] *AEC Authorizing Legislation, Fiscal Year 1973: Hearings Before the Joint Comm. on Atomic Energy*, 92d Cong., 2d Sess. 2,328 (1972) (testimony of James R. Schlesinger).

[7] *Proposed Modification of Restrictions on Enrichment of Foreign Uranium for Domestic Use: Hearings Before the Joint Comm. on Atomic Energy*, 93rd Cong., 2d Sess. 6 (1974) (hereinafter 1974 Hearings).

under the Atomic Energy Act to restrict imports of foreign uranium.[8]

Another AEC witness emphasized that, in the event of a massive increase in low-priced imports of uranium, "[we] will still be living under the restriction in the act that the viability of the domestic industry is the criterion"; that "we would be obligated under the act" to reimpose restrictions because of "the viability issue"; and that "the matter of the viability of the domestic industry is a legal requirement on the Commission under the Act."[9]

3. *Developments in the Uranium Industry*

Domestic production of uranium increased significantly in response to the AEC's predictions of increasing demand and also as a result of provisions in the AEC's enrichment contracts that required utilities to deliver uranium for enrichment irrespective of need.[10] Meanwhile, increased demand for nuclear fuel and the AEC's decision to cease taking new enrichment orders in 1974 also encouraged foreign entities to construct their own enrichment facilities, thus ending this country's monopoly over the provision of enrichment services for commercial nuclear reactors.[11]

In fact, the utilization of uranium in commercial reactors did not increase nearly as dramatically as the AEC had predicted. Orders for new nuclear reactors in the

[8] *Id.* at 8 (testimony of Bruce A. Mercer); *id.* at 232-233 (letter from AEC Chairman Ray to the Joint Committee). *See* p. 5, n.4, *supra*.

[9] *Id.* at 129, 134-135 (testimony of George F. Quinn).

[10] *See* C. Montange, *The Federal Uranium Enrichment Program and the Criteria and Full Cost Recovery Requirements of Section 161 of the Atomic Energy Act*, 2 Journal of Mineral Law & Policy 1, 4 (1986).

[11] S. Rep. No. 100-214, 100th Cong., 1st Sess. 14-15 (1987).

United States declined drastically in the late 1970s and disappeared entirely after 1978. This created a glut in the uranium market and a corresponding decline in the price of uranium ore. Pet. App. 5a.[12]

As early as 1981, representatives of the domestic uranium industry requested DOE to reimpose restrictions on the enrichment of foreign uranium, but DOE refused then and has consistently refused since.[13] The result has been economic disaster for the domestic uranium industry. A recent report issued by the Senate Committee on Energy and Natural Resources summarizes the situation as follows:

> The Energy Information Administration (EIA) of the Department of Energy found, in its 1985 report, that annual domestic uranium production was at its lowest level since the mid-1950's, while exploration and development drilling had dipped to their lowest points since the mid-1960's. The EIA also found employment down to 2,400 person-years in 1985 from 13,700 person-years in 1981. According to testimony given by the EIA before the Senate Committee on Energy and Natural Resources on March 9, 1987, the number of operating mines dropped to 3 in 1986, compared to 362 in 1979. Net earnings for the industry in 1984 and 1985 were negative.[14]

Meanwhile, as DOE has acknowledged, the percentage of foreign-source uranium enriched by DOE for domestic end use climbed steadily from 10 percent in 1981 to approximately 50 percent in 1986, and it continues to increase significantly.[15]

C. *The District Court Proceedings and Concurrent Administrative and Legislative Developments*

After DOE persisted for three years in its refusal to reimpose enrichment restrictions, respondents, uranium mining and milling companies, filed this lawsuit in December 1984, seeking to compel DOE to take the action mandated by Section 161(v) to assure the viability of the domestic uranium industry. DOE, despite overwhelming evidence to the contrary,[16] continued to main-

[12] Nonetheless, according to recent DOE estimates, by the year 2000 domestic demand for uranium is expected to increase by approximately 14 percent and world-wide demand is expected to increase by 37 percent. *See* Energy Information Adm., DOE, *Domestic Uranium Mining and Milling Industry: 1986 Viability Assessment* 66, 83 (1987).

[13] Despite DOE's refusal to act, a DOE official reacted angrily in 1981 to a charge that DOE representatives may have suggested at a meeting with uranium company representatives that DOE would refrain from imposing enrichment restrictions even if the industry became non-viable. The Acting Director of DOE's Office of Uranium Enrichment and Assessment strongly denied that DOE had taken that position:

> However, *I am very concerned that you perceive that we at the Department of Energy (DOE) would disregard our obligations under Section 161v of the Atomic Energy Act.* I cannot understand how you could have arrived at such an erroneous perception. Let me assure you that we take all of our obligations under the Act with the utmost seriousness. Furthermore, *I have no recollection of saying that if we found the mining industry was not viable that we would not take steps to alleviate the situation.* My staff at the meeting took fairly complete notes and there is no indication in their notes that I said anything like that.

J.A. 18 (emphasis added).

[14] S. Rep. No. 100-214, *supra*, at 9.

[15] Peske Affidavit (June 23, 1986), Appendix to Appellants' Motion for Stay in Court of Appeals, at 87-88. DOE's 1986 viability assessment projects that "a growing portion of domestic utility requirements will be supplied by foreign-source uranium during the late 1980's. Throughout the 1990's, imports generally are projected to be more than 50 percent of projected domestic utility requirements." Energy Information Adm., DOE, *Domestic Uranium Mining and Milling Industry: 1986 Viability Assessment*, *supra*, at 68.

[16] The price for uranium plummeted from $43.25 per pound in 1979 to $15.50 per pound in 1984. The 1984 price was less than one-half of domestic producers' average production costs. *See* Pet. Br. 8.

tain that the domestic industry remained viable,[17] and that no restrictions were needed. Pet. App. 6a.

In September 1985, however, while respondents' motion for summary judgment was pending before the district court, DOE issued a formal finding that the industry had not been viable for calendar year 1984. *Id.*[18] DOE subsequently found that the industry was not viable in 1985 and 1986. Pet. Br. 12. The parties agree that the industry continues to be non-viable.[19]

Following DOE's September 1985 determination of non-viability, respondents contended that, given the concededly non-viable state of the domestic uranium industry, Section 161(v) required DOE to take action to restrict enrichment of foreign-source uranium, to the extent necessary to assure the viability of the industry. Petitioners contended that respondents could not complain of DOE's inaction under Section 161(v) because DOE had been given full and unreviewable discretion to decide whether or not to impose enrichment restrictions, and because respondents had cited no facts to show that enrichment restrictions would, in fact, assure the maintenance of a viable domestic industry.[20] DOE argued

[17] *See* Energy Information Adm., DOE, *Domestic Uranium Mining and Milling Industry: 1985 Viability Assessment* (1984).

[18] DOE made its determination pursuant to Section 170B of the Atomic Energy Act, 42 U.S.C. § 2210b, which requires DOE to make an annual assessment of the industry's viability. Before Congress enacted Section 170B in 1983, DOE had failed to make an assessment of the viability of the industry since 1973. One of the purposes of Section 170B was "to compel the implementation of Section 161(v)." 128 Cong. Rec. 28538 (1982) (remarks of Rep. Lujan). *See* pp. 30-33, *infra*.

[19] Remarkably, DOE never found, prior to 1985, that the viability of the industry was threatened, even though the price of domestic uranium had collapsed and thousands of jobs had been lost.

[20] J.A. 39-47.

that its determination of non-viability "[did] not impose any additional duties on [DOE] under [Section] 161(v)." DOE added that the Secretary of Energy had referred the entire question of "causation and possible curative actions in the form of import controls" to the United States Trade Representative, based upon the Secretary's belief that the Trade Representative and "other Executive Branch agencies charged with international trade jurisdiction" were "the most appropriate forums for consideration of this complex problem."[21]

The district court granted respondents' motion for summary judgment. Pet. App. 22a-24a. On June 20, 1986, it entered an order requiring DOE (1) to restrict enrichment of foreign-source uranium to no more than 25 percent of its total enrichment activity for the remainder of the year; (2) to cease enrichment of foreign-source uranium entirely commencing in 1987 (and thus to return to the agency's practice from 1966 to 1977); and (3) to commence a rulemaking to determine whether "criteria less restrictive than those imposed by this order would assure the maintenance of a viable domestic uranium industry." *Id*, at 23a. DOE has never undertaken such a rulemaking.

Meanwhile, in September 1985, the district court entered summary judgment for respondents on a separate count of their complaint that challenged the validity of DOE's standard form enrichment contract on the ground that DOE had not satisfied certain procedural requirements attendant to modification of that contract.[22] Thereafter, in January 1986, DOE commenced a rulemaking proceeding to cure the procedural infirmities identified by the district court. Although the district court's narrow procedural ruling had not addressed

[21] J.A. 46-47 & n.14.

[22] The petition for certiorari does not address the merits of the district court's decision on this issue.

DOE's policy of refusing to reimpose restrictions on enrichment of foreign-source uranium, DOE's notice of proposed rulemaking expressed the agency's intent to continue that policy. 51 Fed. Reg. 3,624 (1986).

On July 29, 1986, more than one month after the district court's issuance of the order challenged here, DOE issued a final rule. 51 Fed. Reg. 27,132. With regard to the issue of enrichment restrictions, DOE determined that, notwithstanding the non-viability of the domestic uranium industry, it would not impose restrictions on the enrichment of foreign-source uranium. DOE made clear that its inclusion of this determination in the rule was intended to strengthen its litigation posture on appeal in the present case by seeking congressional approval of its current interpretation of Section 161(v):

> DOE believes that the *Western Nuclear* judgment is erroneous. . . . DOE is mindful of the ongoing nature of the *Western Nuclear* litigation. Section 762.3 [the rule refusing to impose enrichment restrictions] is being adopted at this time, notwithstanding the *Western Nuclear* litigation, in order to formally record DOE's interpretation of section 161(v), to state DOE's determination that restrictions on enrichment of foreign origin uranium would continue to be inappropriate, to establish the criterion that will be applicable to the enrichment of foreign origin uranium, and to permit Congressional review of that criterion.

Id. at 27,134 n.4.[23]

[23] In the rulemaking, DOE attempted to justify its refusal to impose restrictions on the enrichment of foreign uranium. *Id.* at 27,134-38. DOE argued that Section 161(v) requires restrictions only if DOE makes a finding that such restrictions "are needed to, and in fact, will assure the maintenance of a viable domestic uranium industry." *Id.* at 27,134. DOE asserted that restrictions would not be sufficient to restore the viability of the domestic industry because restrictions would have the effect of increasing the cost of DOE's enrichment services, and DOE could not insure that its enrichment customers would not seek to have foreign uranium enriched by DOE's lower-priced foreign competitors. *Id.* at 27,135-38. Furthermore, DOE asserted that, notwithstanding the poor health of the domestic uranium industry, DOE has a "responsibility to maintain a healthy enrichment program which transcends economic considerations." *Id.* at 27,137 (emphasis added). In other words, DOE claimed that enrichment restrictions would be inappropriate because they would conflict with other policy objectives unrelated to the viability of the domestic industry.

Congress, upon review of DOE's rule, did not approve DOE's policy of refusing to reimpose enrichment restrictions. Instead, in October 1986, Congress enacted Section 305 of Pub. L. No. 99-500, 100 Stat. 1783-209, which provides, *inter alia*, that no provision of DOE's July 1986 final rule "shall affect the merits of the legal position of any of the parties concerning the question[] whether section 161(v) of the Atomic Energy Act requires restriction of enrichment of foreign-origin source material destined for use in domestic utilization facilities." 100 Stat. 1783-210.

D. The Decision of the Court of Appeals

On July 20, 1987, the court of appeals affirmed the district court's order. Pet. App. 1a-21a. Noting that it was required to accord "great deference" to the agency's interpretation of the statute, *id.* at 14a-15a, the court nonetheless held that DOE's position was contrary to the express language and legislative history of Section 161(v), both of which, in the court's view, compel the conclusion that "if the domestic industry is not viable, the DOE must restrict enrichment of foreign uranium." *Id.* at 20a.

The court of appeals pointed out that "Congress considered a viable domestic industry to be vitally important to United States defense and security interests and did not want the United States to become dependent on foreign sources of uranium." *Id.* Furthermore, the court observed that DOE "cannot accomplish its statu-

tory purpose—the maintenance of a viable domestic uranium industry—without imposing restrictions on enrichment of foreign uranium. Rather, the DOE proposes to abandon the statutory goal." *Id.* at 18a. The court concluded:

> The unambiguous language of the statute requires the DOE to refuse enrichment of foreign uranium "to the extent necessary to assure" a viable domestic industry. The DOE may determine how much restriction is required to ensure viability, but it cannot decide not to impose restrictions when the industry is not viable. It must continue to increase restrictions until the domestic industry becomes viable. The DOE's argument that this policy is not wise in the present uranium market should be made to Congress and not to the courts. We can only apply the statute as Congress passed it.

Id.

SUMMARY OF ARGUMENT

Section 161(v) represents a legislative mandate to DOE to maintain the viability of the domestic uranium industry. It prescribes one method by which DOE is to perform that function: by restricting the enrichment of foreign-source uranium. It embodies a congressional judgment that a viable domestic uranium industry is vital to United States national security and defense interests, and represents a congressional prescription as to how that viability is to be assured.

A. Section 161(v) states that DOE "shall not offer" enrichment services for uranium of foreign origin destined for use in domestic facilities; the statute requires that this prohibition be observed "to the extent necessary to assure the maintenance of a viable domestic uranium industry." This language commands DOE to restrict the enrichment of foreign-source uranium unless and until the viability of the domestic uranium industry is assured. Thus, it is only when the viability of the

domestic industry is assured that DOE may offer enrichment services for foreign-source uranium. The phrase "to the extent necessary" authorizes DOE to determine the *amount* of enrichment restrictions necessary to assure a viable domestic industry; it does not grant DOE discretion to refuse to impose any restrictions at all when the industry's viability is not assured.

Here, there is no question that the domestic uranium industry's viability is not assured. DOE concluded that the industry was not viable during 1984, and it concedes that the industry has remained non-viable since. DOE nonetheless refuses to impose restrictions on the enrichment of foreign-source uranium.

Petitioners purport to justify DOE's refusal to act by arguing that the statute gives DOE the discretion to decide whether enrichment restrictions are "necessary." But petitioners have confused the question whether restrictions are *necessary* with the question whether they would be *sufficient* to assure the viability of the domestic uranium industry. To read the statute as if it said "sufficient" rather than "necessary," as petitioners do, ignores the statute's plain words.

B. The context and legislative history of Section 161(v) strongly support the conclusion that the statute mandates enrichment restrictions upon a finding of non-viability. Congress viewed the viability of the domestic uranium industry as essential to United States defense and national security interests. Congress clearly believed that the means it chose to preserve the industry's viability—enrichment restrictions—would be fully effective. DOE's decision not to follow the statutory command reflects a disagreement with the wisdom of the statute, but, as the court of appeals concluded, DOE's policy concerns "should be made to Congress and not to the courts." Pet. App. 18a.

C. Moreover, the structure of the Atomic Energy Act reinforces the notion that Congress believed that the

imposition of enrichment restrictions pursuant to Section 161(v) would assure the viability of the domestic uranium industry. Congress included in the Act provisions authorizing the AEC to utilize its licensing power to restrict imports of foreign uranium. By exercising its authority to restrict imports, the government can prevent its domestic enrichment customers from purchasing low-cost foreign uranium and having it enriched abroad. Thus, the government has at hand the means to make enrichment restrictions an effective tool for assuring the domestic industry's viability. DOE cannot refuse to take the action commanded by Congress to achieve the statutory purpose merely because DOE and other agencies have not taken other available actions that might render enrichment restrictions more efficacious.

D. There is no merit to petitioners' argument that the enactment in 1983 of Section 170B of the Act, 42 U.S.C. § 2210b, was intended to weaken the command of Section 161(v). To the contrary, by requiring DOE to make an annual assessment of the viability of the domestic industry, Section 170B was meant to close a loophole whereby DOE had evaded its responsibilities under Section 161(v) by failing to consider whether or not the domestic industry was viable.

E. Even if DOE's interpretation were not contrary to the language and history of the statute, it would not be entitled to any deference. In this regard, petitioners' reliance on *Young v. Community Nutrition Institute*, 476 U.S. 974 (1986), is entirely misplaced. In *Young*, the agency had more than one available method with which to achieve the statutory goal, and chose one of those methods. Here, in contrast, DOE has refused to take the one action commanded by the statute and hence it has abandoned the statutory goal.

Furthermore, judicial deference is not owing to DOE's interpretation, because its present position conflicts with the position previously taken by the agency over the years.

In addition, the agency's present position is not entitled to any weight because it appears to be driven by DOE's preoccupation with concerns about its enrichment enterprise and with policies such as "free trade" that are clearly extraneous to the policy concerns that led Congress to enact Section 161(v).

Moreover, DOE's new-found interpretation improperly relies upon a "determination" that was made for the express purpose of obtaining congressional approval of its litigation position in this case. That determination has never been made a part of the record and was not even in existence at the time summary judgment was granted. Congress in fact rejected DOE's request for approval of its post-hoc rationalization. Instead, Congress foreclosed any reliance on DOE's determination by providing that "no provision" of DOE's July 1986 rules shall affect the merits of the statutory question presented in this case.

ARGUMENT

SECTION 161(v) EMBODIES CONGRESS' DETERMINATION THAT RESTRICTIONS ON ENRICHMENT OF FOREIGN-SOURCE URANIUM ARE NECESSARY TO ASSURE THE VIABILITY OF THE DOMESTIC URANIUM INDUSTRY AND MUST BE IMPOSED WHEN THE INDUSTRY'S VIABILITY IS THREATENED.

A. The Plain Language of the Statute Undermines DOE's Position That It Has Discretion To Ignore the Statutory Mandate.

Section 161(v) states that DOE "*shall not offer*" enrichment services for foreign-source nuclear materials destined for use in United States facilities "to the extent necessary to assure the maintenance of a viable domestic uranium industry." 42 U.S.C. § 2201(v) (emphasis added). There is nothing in the language of Section 161(v) that suggests that DOE has discretion to decide not to take steps to assure the maintenance of a viable

domestic industry by restricting the enrichment of foreign-source uranium. There also is nothing that suggests that DOE must make a finding, prior to imposing enrichment restrictions, that such action will in fact culminate in the desired result of a viable industry. To the contrary, the word "shall" is the language of command, and Congress, having determined that enrichment restrictions would help to ensure the maintenance of a viable domestic uranium industry, mandated that such restrictions must be imposed whenever the industry's viability is threatened.

Here, there is not merely a threat to the uranium industry's viability. For several years, the Secretary of Energy has made an affirmative finding that the industry is not viable. Therefore, Section 161(v) requires that DOE impose the remedy prescribed by Congress to assure the viability of the industry.

Contrary to petitioners' view, the phrase "to the extent necessary" does not permit DOE to avoid imposing restrictions simply by asserting doubts about whether restrictions will be sufficient to restore the industry to a condition of viability. The phrase "to the extent necessary" in ordinary idiomatic English usage, when used in a sentence directing a subject to take a specified action "to the extent necessary" to achieve a specified result, means that the action shall be performed until the specified result occurs. As the court of appeals correctly concluded, the phrase "to the extent necessary" "informs the DOE of the *amount* of restriction required; it does not provide a scenario in which the DOE is excused from restricting . . . enrichment [of foreign-source uranium] notwithstanding a nonviable domestic industry." Pet. App. 17a (court's emphasis).

This commonsense reading of the statute is bolstered by Section 161(v)'s directive to DOE—in the sentence immediately following the one at issue—to establish written criteria "setting forth . . . *the extent to which* [enrichment] services will be made available" for foreign-source uranium intended for use in United States facilities. 42 U.S.C. § 2201(v) (emphasis added). Just as the phrase "the extent to which" in this sentence refers to the amount of enrichment services to be made available, so too the phrase "to the extent necessary" in the sentence at issue refers to the amount of restrictions to be imposed on enrichment services.[24]

Under the plain reading of the statute, therefore, DOE must restrict the enrichment of foreign-source uranium *unless and until* the viability of the domestic industry is assured. Conversely, it is only when the viability of the domestic industry is assured that DOE is authorized to offer enrichment services for foreign-source uranium. If the viability of the domestic industry is threatened, or if, as here, the industry concededly is not viable, DOE must continue to impose enrichment restrictions until viability is assured.

Petitioners themselves acknowledge (Pet. Br. 29) that Congress, in Section 161(v), "chose a specific means"—enrichment restrictions—"to achieve a specific end"—assuring the viability of the domestic uranium industry. Moreover, petitioners concede (Pet. Br. 39) that the central assumption underlying Section 161(v) is that restrictions on the enrichment of foreign-source uranium would assure the viability of the domestic uranium industry in the event the industry were threatened by large-scale imports of low-cost foreign uranium. Petitioners nevertheless resist the logical conclusion that flows from these concessions: that Congress, in enacting the statute, found that enrichment restrictions are "necessary" and must be

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[24] The district court's order is fully consistent with this view of the statute. Although the district court ordered DOE to reimpose enrichment restrictions, it provided DOE with the flexibility of determining, through rulemaking, what level of restrictions would ensure the maintenance of a viable domestic industry. Pet. App. 23a.

imposed whenever viability is threatened. Petitioners can point to nothing in the statute that gives DOE the power to overrule that congressional finding.

This is what the court of appeals meant by its observation that Section 161(v) "instructs that when domestic nonviability is determined, restrictions on enrichment of foreign-source uranium must be imposed and must become increasingly aggressive . . . until the domestic industry is rejuvenated and becomes viable." Pet. App. 17a. Contrary to petitioners' surmise (Pet. Br. 38), the court was *not* making any tacit factual findings at variance with DOE's extra-record "finding" that restrictions would not be sufficient to produce viability. Rather, the court was simply reading the statutory command, consistent with its plain meaning, to permit DOE to enrich foreign-source uranium only if the domestic industry's viability is assured.

Furthermore, petitioners' interpretation of the statute is fatally flawed on its own terms because petitioners have confused the question whether restrictions are *necessary* with the question whether they would be *sufficient* to assure the viability of the domestic uranium industry. Petitioners do not claim that the domestic uranium industry cannot attain viability. They simply assert that the single act required by Section 161(v)—restricting enrichment of foreign-source uranium—would not *by itself* restore the industry. But that does not mean that restrictions are not *necessary*; it means only that, in petitioners' view, restrictions alone may not be *sufficient* to ensure viability. The sufficiency *vel non* of restrictions, however, is irrelevant under the statute.

Petitioners nonetheless argue that the statute must be interpreted as if it said "sufficient" rather than "necessary." They assert that the statutory phrase "necessary to assure" is somehow "more akin to a sufficient condition than a necessary condition," and that therefore "necessary" should be read as if it said "sufficient." Pet.

Br. 27-29. This verbal sleight-of-hand merely seeks to cloud the fact that petitioners have misread the statute. Restrictions clearly may be "necessary to assure" viability even though they might not, by themselves, produce viability.[25]

B. The Context and Legislative History of Section 161(v) Strongly Support the View That Restrictions Are Mandatory, Not Discretionary, So Long As the Viability of the Industry Is Threatened.

The Private Ownership Act represented a significant change in the regime applicable to fissionable nuclear materials such as uranium. When Congress was considering this major change in the applicable regime from public to private ownership, an overriding concern was the impact of the change on the domestic uranium industry, which before 1964 had been entirely dependent on purchases by the Government through the AEC. As the legislative history demonstrates, representatives of the domestic uranium industry were apprehensive about foreign dumping of excess or subsidized supplies at prices below those with which domestic suppliers could compete.[26]

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[25] Petitioners' own analysis, moreover, confirms that restrictions are indeed "necessary." Petitioners' argument that enrichment restrictions would not assist the industry is in large measure premised upon DOE's lack of a complete monopoly on enrichment services. *See* Pet. Br. 14, 22. DOE is fearful that domestic utilities will contract with foreign enrichment enterprises in order to avoid an obligation to deliver only U.S.-origin uranium for enrichment. But petitioners' argument overlooks the fact that, as petitioners themselves acknowledge (Pet. Br. 28 n.21), the government is currently authorized by existing statutes and regulations to retain its domestic enrichment customers by restricting the importation of enriched uranium. *See* pp. 26-29, *infra*.

[26] *See, e.g.*, 1963 Hearings, at 114-115 (testimony of representative of United Nuclear Corp.). *See also id.* at 145 (testimony of representative of AFL-CIO):

> Under [certain proposed legislation], uranium ore can be imported and enriched at costs undercutting the cost of enriched

Industry representatives also expressed concern that there would be insufficient demand for uranium by nuclear-powered utilities to sustain a viable domestic uranium industry against low-cost foreign producers.[27] Loss of a viable domestic uranium industry was viewed by both uranium producers and consumers as contrary to basic United States interests.[28]

The AEC also acknowledged that "it [is] essential that [the domestic uranium] industry be maintained viable . . . ."[29] The Commission offered to bar enrichment of foreign-source uranium for domestic end-use as an administrative matter pursuant to its general authority under the Atomic Energy Act.[30] However, uranium producers, expressing concern about the reliability of a commitment to assure the viability of the domestic industry absent an express statutory obligation, called for specific legislation to address the issue.[31]

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domestic ore. The effect of increasing imports of uranium ore by private processors under this legislation would be to reduce operations even further and to close down many uranium mines. This would cause a serious loss of jobs in the uranium ore mining and processing industry.

[27] *See, e.g.*, 1964 Hearings, at 143 (testimony of representative of Anaconda Co.); *id.* at 154 (testimony of representative of Kerr-McGee Oil Industries).

[28] Thus, a representative of the Bechtel Corporation proposed that "[i]mportation of foreign uranium for toll enrichment or other use in the United States be permitted *but restricted to provide for a healthy U.S. uranium mining and milling industry.*" 1964 Hearings, at 66 (emphasis added). Similarly, a representative of General Electric expressed support for "*such protective steps as may be necessary to assure a healthy domestic uranium industry.*" *Id.* at 116 (emphasis added).

[29] *Id.* at 4.

[30] *Id.* at 5, 16-17.

[31] *Id.* at 155-156.

In response, the Vice Chairman of the Joint Committee requested Dean McGee, a spokesman for the industry, to propose legislation.[32] Mr. McGee proposed the language that ultimately became the criteria and enrichment limitation provisos in Section 161(v).[33] There was no "sunset" or other cut-off on this obligation. To the contrary, it was clearly intended to *limit* the agency's discretion to decline to impose enrichment limitations for as long as the provision remained in the statute.[34]

The Joint Committee on Atomic Energy emphasized that the enrichment restriction proviso was included in response to concerns

> expressed during the committee's hearings over the effect on the domestic uranium industry of substantial imports of foreign uranium for enrichment and sale on the domestic market. It was pointed out that such importation could have a serious impact on the uranium mining and milling industry, particularly during a period of limited demand for its product.

S. Rep. No. 1325, *supra*, at 16.

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[32] *Id.* at 195-196.

[33] The proposed legislation provided in pertinent part:

> That the Commission shall establish criteria in writing setting forth the terms and conditions of making such production or enrichment services available and, in this regard, shall not extend its services to source or special nuclear materials of foreign origin intended for domestic use to the extent necessary to assure the development of a viable domestic uranium mining and milling industry.

Id. at 198.

[34] Section 161(v) is more emphatic on this point than the provision that was put forward by Mr. McGee. Whereas Mr. McGee's proposed version would have directed the AEC to restrict enrichment "to assure the *development* of a viable domestic uranium mining and milling industry," 1964 Hearings, at 198 (emphasis added), the legislation as enacted directs the agency to withhold enrichment of foreign uranium "to assure the *maintenance* of a viable domestic uranium industry." 42 U.S.C. § 2201(v) (emphasis added).

This view was echoed in statements made during the debates by supporters of the legislation. For example, Representative Morris remarked:

> The flexible restriction on the enrichment of foreign uranium contained in this bill will protect our industry against ruinous competition from cheap foreign uranium. Our uranium industry is a vital link in the national defense and security. It has been built and nurtured by vast Government expenditures. The Joint Committee had the foresight to protect our investment in this industry during a possible period of limited demand for uranium.

110 Cong. Rec. 20145 (1964); *see also, id.* (remarks of Rep. Aspinall).

In short, Congress believed that "the measures taken in this bill to assure the viability of the domestic uranium industry" would, in fact, achieve that goal. S. Rep. No. 1325, *supra*, at 17. Furthermore, Congress intended the statute as a mandatory command "not to offer such [enrichment] services," *id.* at 30, when the uranium industry's viability is threatened.

To support their contrary position, petitioners point to the statement of the Joint Committee to the effect that Section 161(v) would impose a "flexible" restriction and would require the agency "to offer or refuse to offer enrichment services on a basis which will assure, in its opinion, the maintenance of a viable domestic uranium industry." S. Rep. No. 1325, *supra*, at 31. *See* Pet. Br. 33-34. But, as the Joint Committee explained, the term "flexible" in this context denotes, not flexibility as to whether or not to impose any restrictions when the viability of the domestic industry is threatened, but only flexibility "as to the duration and degree of the restriction." S. Rep. No. 1325, *supra*, at 31. Congress viewed Section 161(v) as a "flexible" alternative to a proposed ban on foreign enrichment that would have expired automatically after ten years. *Id.* at 30-31. Instead, Congress

enacted a flexible ban keyed to whether the viability of the domestic industry is threatened. Contrary to petitioners' contention (Pet. Br. 34), Congress' rejection of the "rigid approach" of an outright ten-year ban on enrichment of foreign uranium does not in any way imply that DOE is free to refuse to impose restrictions in the event the industry is not viable.

It is evident from the legislative history of Section 161(v) that Congress believed that the imposition of enrichment restrictions would in fact assure the viability of the industry under any imagined future scenario.[35] Congress therefore directed the agency to impose restrictions so as to maintain the industry's viability. Contrary to petitioners' contention, Congress did not undercut its own directive by granting discretion to DOE to second-guess the congressional judgment that enrichment restrictions would be effective in achieving the statutory purpose.

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[35] It is precisely because Congress did not foresee a situation in which enrichment restrictions might be alleged to be ineffective to assure viability that petitioners' hypothetical of exhausted domestic uranium reserves (Pet. Br. 26) is meaningless as a tool of argument in this case. Apparently, the point of this hypothetical is to demonstrate that Congress could not possibly have intended to compel DOE to impose restrictions whenever the viability of the domestic industry is threatened, because Congress would have realized that this would lead to the "absurd" result that restrictions would be required even when domestic uranium reserves were exhausted. The example does not illuminate congressional intent, however, because it is highly unlikely that Congress, at the time it enacted Section 161(v), ever considered such a fanciful example—or, indeed, *any* situation in which enrichment restrictions would not produce viability. As the Joint Committee noted at the time, "the United States has, today, among the largest uranium reserves in the world." S. Rep. No. 1325, *supra*, at 10. Furthermore, it should be noted that Congress has exercised continuous oversight under the Atomic Energy Act to respond to changing conditions. Accordingly, if Section 161(v) ever became obsolete because of circumstances like those postulated by petitioners, it is certain that Congress would enact appropriate legislation to deal with the situation.

At bottom, petitioners' argument is that in the present circumstances—which allegedly were unforeseen by Congress—the imposition of enrichment restrictions would not, in DOE's view, actually assure the viability of the domestic uranium industry. This argument does nothing to advance the inquiry into congressional intent. Instead, it merely reflects DOE's disagreement with the continued wisdom of the statute and with the underlying congressional judgment that restrictions would assure viability. The court of appeals correctly concluded that this policy argument "should be made to Congress and not to the courts." Pet. App. 18a. *See TVA v. Hill*, 437 U.S. 153, 194 (1978).[36]

C. The Structure of the Atomic Energy Act Confirms That Congress Viewed the Mandatory Authority Provided in Section 161(v) As Necessary To Assure the Industry's Viability.

In enacting the Private Ownership Act in 1964, Congress believed that it had provided the AEC with sufficient authority to deal with any contingency that might threaten the viability of the domestic uranium industry. During the 1963 hearings, the AEC was asked what action could be taken if domestic utilities sought to defeat

[36] Congress in fact is currently considering legislation that would attempt both to assure the viability of the domestic uranium industry and to meet the concerns of DOE about the soundness of its enrichment enterprise. The legislation would replace Section 161(v) with a system of graduated charges payable by domestic reactor operators for the use of foreign uranium, and would turn DOE's enrichment enterprise over to a new Government-owned corporation. *See* S. Rep. No. 100-214, *supra* (favorable report by Senate Energy and Natural Resources Committee on S. 1846).

In discussing the need for the proposed legislation, the Senate Report refers to "a ban on DOE enrichment of foreign uranium" as being "mandated" by the Atomic Energy Act "upon a finding of non-viability." *Id.* at 10. The Report, to be sure, questions whether the results of such a mandatory restriction would be desirable, *id.*, but such arguments are relevant to whether the statute ought to be amended, not to what the statute means.

the purpose of a restriction on enrichment by purchasing foreign-source uranium, having it enriched abroad, and importing it for use in the United States. The AEC's representative responded that the agency would have the authority to prevent such an occurrence by promulgating regulations restricting such imports.[37]

At that time, the AEC's statutory authority to issue regulations limiting uranium imports was contained in Section 161(b) and (p) of the Atomic Energy Act, 42 U.S.C. § 2201(b) and (p). Pursuant to Section 161(b), the agency could restrict the "possession and use" of special nuclear material in order "to promote the common defense and security." 42 U.S.C. § 2201(b). In the Private Ownership Act, Congress provided the AEC with additional, more explicit, authority to restrict imports of special nuclear material. The new legislation amended the Atomic Energy Act to provide that the agency shall not issue an import license to anyone within the United States if it finds that the issuance of such a license "would be inimical to the common defense and security." 42 U.S.C. §§ 2073(a), 2077(c).

The Joint Committee made clear that the agency's prior licensing authority and its authority to issue rules governing the possession and use of uranium would continue notwithstanding the elimination of the requirement that all uranium be Government-owned. S. Rep. No. 1325, *supra*, at 20. The Committee noted further that the AEC was to be given explicit new authority to "regulate, by

[37] *See* 1963 Hearings, at 29-30:

> [Rep. Hosmer:] What about a domestic user buying foreign ore, assuming that the United Kingdom toll charges are less than ours, having it processed, and then bringing it into the United States? Are you going to write in some protection in that regard, too?
>
> [AEC General Counsel Joseph F. Hennessey:] This could be covered either under the agreement for cooperation with the foreign country or under our own import regulations.

licensing, imports . . . so as to safeguard . . . the common defense and security." *Id.* at 29.

At hearings in 1974 before the Joint Committee, an AEC representative confirmed that the statutory authority to restrict imports could be used, together with Section 161(v), to ensure the viability of the domestic uranium industry.

> [Mr. Mercer.] Although we have indicated that we do not anticipate that the viability of the domestic industry would be threatened by this course of action [*i.e.*, the removal of enrichment restrictions,] should it become threatened and it is in the national security interest to see that it remains viable, there are alternative legal measures that one can take. . . . There is section 69 of our act where we can preclude import licensees [sic] in the interest of the common defense and security, we can preclude licensees [sic] for the import of source material. There is also section 161v—
>
> [Representative Hosmer.] Does that include economic considerations, common defense and security?
>
> [Mr. Mercer.] The common defense and security we consider now and was considered at the time the restriction was placed in the act is dependent to a degree on the viability of our domestic mining and milling industry to provide feed material. That was the basis in the first instance for section 161v.

1974 Hearings, at 8. *See also, id.*, at 232-233 (letter from AEC Chairman Ray to the Joint Committee) (noting availability of Section 57 import restrictions).

When the AEC was abolished, the authority to license imports was transferred to the newly-created Nuclear Regulatory Commission. Petitioners acknowledge (Pet. Br. 28 n.21) that the NRC may restrict the "possession and use" of special nuclear material in order "to promote the common defense and security." The clear thrust of petitioners' argument is that the imposition of enrichment restrictions, without also imposing import restrictions, would implicate such defense and security concerns

by threatening DOE's enrichment enterprise. Of course, the legislative history of Section 161(v) makes clear that Congress viewed the viability of the domestic uranium industry as also essential to the national security and defense. *See* pp. 5, 24, *supra*. In any event, if plaintiffs are correct that DOE's enrichment enterprise would be threatened by the imposition of enrichment restrictions, the government has available the authority provided by the Atomic Energy Act to restrict imports of uranium enriched abroad. The availability of import restrictions to prevent the defection of DOE's domestic enrichment customers confirms that the government has the means at hand to make enrichment restrictions under Section 161(v) a powerful tool for restoring the viability of the domestic uranium industry.

Furthermore, the fact that the NRC, rather than DOE, has licensing authority over uranium imports provides no basis for DOE to resist carrying out its mandated function under Section 161(v).[38] Before the AEC was abolished, that agency had sole authority to restrict both enrichment of foreign uranium and importation of uranium enriched abroad. In transferring the responsibilities of the AEC to the newly-created agencies, Congress could not have intended to permit DOE to avoid its statutory obligations through an Alphonse-Gaston approach to statutory construction.

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[38] It should be noted in this regard that, under the NRC's regulations, a utility can obtain a "general" import license for enriched uranium if the utility is authorized to possess such material under a contract with DOE. 10 C.F.R. § 110.27(a)(1) (1987). Otherwise, the utility must apply for a "specific" import license covering each planned shipment (or series of shipments) of enriched uranium. *Id.* § 110.30 *et seq.* Thus DOE can exert a direct influence upon import licensing through the exercise of its contract power.

D. Section 170B of the Atomic Energy Act Was Intended by Congress to Strengthen, Not Weaken, the Statutory Framework Supporting the Viability of the Domestic Uranium Industry.

In 1983, when restrictions on the enrichment of foreign uranium were in the last stage of their gradual phase-out, Congress acted to strengthen the statutory requirements for assuring the viability of the industry. Congress enacted Section 170B of the Atomic Energy Act, 42 U.S.C. § 2210b, because DOE had failed to investigate the viability of the domestic industry since 1973, and had failed to prescribe any objective indicia for measuring that viability. Domestic uranium mining and milling companies alerted Congress that DOE was failing to live up to its obligations under Section 161(v) by continuing to assert that the domestic industry was viable despite mounting evidence to the contrary. Congress was concerned that DOE could escape its responsibility to assure the viability of the domestic industry by failing to monitor and formally determine the viability of the industry. It acted to close that loophole through enactment of Section 170B, which requires DOE to make annual viability determinations.

The legislative history of Section 170B makes Congress' intention to close DOE's "loophole" clear beyond question. Representative Lujan, one of the members of the Conference Committee that proposed enactment of Section 170B, remarked:

> Congress has consistently recognized the importance of maintaining a viable domestic uranium industry . . . . We adopted Section 161(v) of the Atomic Energy Act directing the Atomic Energy Commission, now the Department of Energy, to take such actions in the provision of enrichment services as were necessary to maintain a viable domestic industry. The Department, to my sorrow, has failed to implement that provision . . . .

> The uranium supply provision before us makes use of existing law to assure the maintenance of a viable uranium industry. It simply calls for the Department to issue criteria for determining viability and to make a viability determination . . . on an annual basis. *This will serve to compel the implementation of Section 161(v).*

128 Cong. Rec. 28538 (1982) (emphasis added).

Similarly, Senator Domenici, one of the leading sponsors of the legislation that became Section 170B, observed:

> The Conference Committee also provides that the Secretary of Energy monitor and report on the viability of the domestic uranium industry on an annual basis from now until 1992. In making that report the Secretary would be required to submit a determination as to whether or not the domestic uranium industry is viable. *In the event that the Secretary were to find that the domestic industry was not viable, existing provisions in the Atomic Energy Act would provide the Secretary with the authority to help maintain the viability of the industry.*

128 Cong. Rec. S13054 (daily ed. Oct. 1, 1982) (emphasis added).[39] *See also*, H.R. Conf. Rep. No. 97-884,

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[39] Senator Domenici subsequently explained that the need for a specific objective "trigger" initiating DOE's obligations pursuant to Section 161(v) was the primary motivation for passage of Section 170B:

> [DOE] claims that the annual determination that we required the Secretary to make about the viability of the domestic mining industry was not related to the requirement contained in 161(v) of the act that the Secretary must maintain a viable domestic mining industry. I have said in the past that this is a false interpretation and I must, once again, call their attention to the transcripts of the conference committee on H.R. 2330. The very first time I introduced this concept to the committee on September 16, 1982, I stated that the reason it was needed was because while "the word viability; that is, the viability of the domestic industry is a trigger," for the Secre-

97th Cong., 2d Sess. 51 (1982) (Secretary of Energy's "annual viability assessment criteria will be used as the basis for carrying out his responsibilities . . . under . . . section 161v").

In the face of this legislative history, petitioners' contention (Pet. Br. 35-37) that Section 170B was intended to *weaken*, not strengthen, the statutory framework supporting the viability of the domestic uranium industry strains credibility. Petitioners' misguided argument relies in part on the fact that an earlier version of the legislation, which contained mandatory import restrictions on foreign-source uranium, was rejected when Section 170B eventually was enacted. However, petitioners fail to distinguish between mandatory *import* restrictions as originally proposed in the legislation and mandatory *enrichment* restrictions already authorized under Section 161(v), which Section 170B was intended to complement. The fact that Congress failed to enact the proposed mandatory *import* restrictions says nothing about its views on the pre-existing *enrichment* restrictions, except perhaps that, as recently as 1983, Congress continued to believe that Section 161(v), once implemented by DOE, would assure the viability of the domestic uranium industry and that direct, mandatory import restrictions would not be advisable.

Petitioners also point out that the Conference Committee proposed, but Congress failed to enact, a measure that would have called for automatic revision of DOE's enrichment criteria whenever the amount of contracted-for foreign uranium exceeded a fixed percentage (37.5 percent) of annual total domestic reactor demand. *See*

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tary to assist the industry, "we have not been able to get any satisfactory measurement of viability, and so this provision would be an objective measurement. * * *" Thus the clear purpose of section 170B was to provide that the Secretary carried out his responsibility under 161(v) by requiring a review of the viability of the industry on an annual basis.

132 Cong. Rec. S10132 (daily ed. Aug. 1, 1986).

H.R. Conf. Rep. No. 97-884, *supra*, at 17, 52. But viability was simply not an issue in the proposed legislation; revision of the enrichment criteria would have been required whether or not the domestic industry's viability was threatened. Accordingly, Congress' failure to enact this measure in no way implies a repudiation of the enrichment restrictions mandated by Section 161(v), which are keyed to the viability of the domestic industry rather than to a fixed percentage of imports.[40]

In sum, there is no merit to petitioners' argument that the enactment of Section 170B is somehow inconsistent with the interpretation of Section 161(v) later adopted by the courts below. To the contrary, Section 170B was intended to eliminate DOE's "discretion" to ignore the domestic industry's condition. It strengthens, rather than weakens, the statutory framework supporting the viability of the domestic industry.

E. DOE's Interpretation Is Not Entitled To Deference and May Not Be Considered In Interpreting Section 161(v).

Relying on this Court's decision in *Young v. Community Nutrition Institute*, 476 U.S. 974 (1986), petitioners contend (Pet. Br. 23-25) that the Court must defer to DOE's interpretation of the statute. This contention is flawed for a number of reasons.

1. First, petitioners' reliance on *Young* is misplaced. The statute in *Young* provided that, when certain poi-

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[40] Indeed, during the debate in which the 37.5 percent "trigger" provision was rejected, Representative Gibbons, a key opponent of the measure, argued that "[t]here are adequate remedies under the present law that have been in existence for a long time, so that [the domestic] uranium industry, if it is impacted as they think it is going to be impacted can go and get relief." 128 Cong. Rec. 28539 (1982). Representative Gibbons also referred to the availability of import restrictions to protect the domestic industry if national security were threatened. *Id.*

sonous substances were unavoidably present in food, "the Secretary shall promulgate regulations limiting the quantity therein or thereon to the extent that he finds necessary for the protection of public health." *Id.* at 977, *quoting* 21 U.S.C. § 346. The Court in *Young* deferred to the agency's long-standing interpretation that the phrase "to the extent that he finds necessary" modified "shall promulgate regulations." Under this interpretation, the Secretary had discretion to "find" to what extent it was necessary to promulgate regulations in order to fulfill the statutory purpose of the "protection of public health." The Secretary in *Young* had decided that "action levels," rather than formally-promulgated "tolerance levels," were a sufficient means of achieving the statutory purpose.

In this case, there is no dispute that the phrase "to the extent necessary" modifies the phrase "shall not offer such [enrichment] services." The critical distinction, however, is that in *Young* the agency had available alternative means for exercising its authority, and it determined that it could achieve the statutory purpose—the protection of public health—by one of those means. Here, in contrast, the method of achieving the statutory goal of ensuring the industry's viability has been prescribed by Congress: Section 161(v) requires DOE to restrict enrichment of foreign-source uranium. Thus, here, unlike in *Young*, the agency has abandoned the statutory goal by refusing to take the one action specified by Congress for achieving that goal.

Nor is petitioners' position grounded on a well-settled agency interpretation of the statute warranting judicial deference, as in *Young*. On the contrary, petitioners' present position directly conflicts with the position taken by the agency through the years. *See* pp. 5-7, *supra*. Thus, petitioners' current view of the statute need not be accorded any deference. *See INS v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1221 n.30 (1987).

Furthermore, it would be error to defer to DOE's present interpretation, because the agency's newly-conceived view of the statute rests on concerns other than those underlying Section 161(v). Despite petitioners' lip service to the "purpose" of Section 161(v), DOE's refusal to take any action to assure the viability of the domestic uranium industry is driven by DOE's concern that, if enrichment restrictions are imposed, it may lose some enrichment business to foreign competitors, and by the present Administration's preference for a so-called "free trade" policy. *See* 51 Fed. Reg. at 27,137.[41]

Even accepting at face value the explanation proffered by petitioners for DOE's refusal to act, it is outrageous for petitioners to claim that DOE need not comply with the statute because, in DOE's view, restrictions would not, in and of themselves, suffice to restore the presently non-viable uranium industry to viability. For years, DOE ignored the pleas of the domestic industry that Section 161(v) required the agency to impose enrichment restrictions in order to maintain the industry's viability. Because DOE refused to act when the industry's viability was threatened, the industry became non-viable. Now that the industry is not viable, DOE continues to refuse to take any action.

If petitioners are correct, an agency like DOE could veto a congressional policy directive simply by sitting on its hands and ignoring its statutory obligations for a long enough period of time to render action under the statute ineffective. The Court should not countenance such an irresponsible and fundamentally lawless position.

2. Finally, petitioners improperly seek to draw support for their new interpretation from assertions set forth in DOE's July 1986 rulemaking, which was not

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[41] *Cf.* S. Rep. No. 100-214, *supra*, at 95 (letter from Secretary of Energy to Chairman of Senate Committee on Energy and Natural Resources).

issued until after the district court had entered its order in this case rejecting petitioners' construction of Section 161(v). That rulemaking is merely a post hoc rationalization by the agency in support of its litigating position, and is entitled to no deference whatsoever. *See, e.g., SEC v. Chenery Corp.*, 318 U.S. 80 (1943).[42]

Petitioners suggest (Pet. Br. 21, 38-39) that the court of appeals may have engaged in "extra-record fact-finding" in rejecting DOE's July 1986 "determination" that enrichment restrictions would not assure viability. On the contrary, it is petitioners who are asking this Court to engage in "extra-record fact-finding" by their reliance on a "determination" that was made after the district court's June 1986 ruling, and that therefore has never been part of the record in this case. For this reason, DOE's determination cannot be considered in passing upon respondents' motion for summary judgment. *See* Fed. R. Civ. P. 56(e); *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2553 (1986).

Petitioners' reliance (Br. 13-15) on DOE's July 1986 rulemaking is foreclosed in any event by Congress' explicit directive, in Section 305 of Pub. L. No. 99-500, that "no provision" of DOE's July 1986 rules "shall affect the merits of the legal position of any of the parties concerning the question[] whether section 161(v) of the Atomic Energy Act requires restriction of enrichment of foreign-origin source material destined for use in domestic utilization facilities." 100 Stat. 1783-210. By incorporating in the July 1986 rulemaking its rationale for failing to reimpose enrichment restrictions, DOE hoped to secure congressional approval of that policy. *See* p. 12, *supra*. Congress, however, refused to place its imprimatur on DOE's policy, and, instead, it expressly provided

[42] *See also* Anthony, *Which Agency Interpretations Should Get Judicial Deference—A Preliminary Inquiry*, 40 Admin. L. Rev. 121, 122 (1988) (suggesting that an agency's "self-judging" interpretive expressions do not merit judicial deference).

that DOE's rulemaking cannot be considered in resolving the issue presented in this case.[43]

CONCLUSION

The judgment of the court of appeals should be affirmed.[44]

Respectfully submitted,

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March 1988

[43] Petitioners attempt to avoid the mandate of Pub. L. No. 99-500 by disclaiming any notion that they view that statute as "having ratified" DOE's interpretation of Section 161(v). Pet. Br. 15 n.12. But the problem remains that petitioners are urging the Court to decide this case based upon an agency determination that Congress has decreed shall be given no consideration. Consistent with the command of Congress, the Court should approach this case as it would if two private litigants were urging different interpretations of a statute. The Court's role in such a case is simply to declare what the statute means. *See SEC v. Sloan*, 436 U.S. 103, 117-118 (1978).

[44] This brief does not address the arguments presented by certain amici concerning the effect of the General Agreement on Tariffs and Trade (GATT), Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 187. The GATT issue was not fairly presented by the petition for certiorari and thus is not appropriate for consideration by the Court. *See* Sup. Ct. R. 21.1. Under the interpretations proffered by amici, DOE would be utterly prohibited by the GATT from restrict-

ing the enrichment of foreign uranium pursuant to Section 161(v) for whatever reason. Not even petitioners adhere to this extreme position. Moreover, Article 21 of the GATT contains an explicit exemption for a party's actions regarding fissionable materials.

In recommending enactment of Section 161(v), the Joint Committee concluded that the imposition of restrictions "on the performance of services" by the AEC would not be inconsistent with any obligations the United States might have under the GATT. S. Rep. No. 1325, *supra*, at 17. In any event, where a statute is inconsistent with a previously adopted treaty or executive agreement, the statute is paramount. *See* L. Henkin, *Foreign Affairs and the Constitution* 163 & n.111 (1972), *discussing Whitney v. Robertson*, 124 U.S. 190, 194 (1888). *See also*, Restatement of the Foreign Relations Law of the United States, § 135(a)(1) (Tent. Final Draft 1985).